Supreme Court, U.S.
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No. 88-1460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DENNIS GROHS,

Petitioner,

v.

GOLD BOND BUILDING PRODUCTS,
a division of NATIONAL GYPSUM COMPANY,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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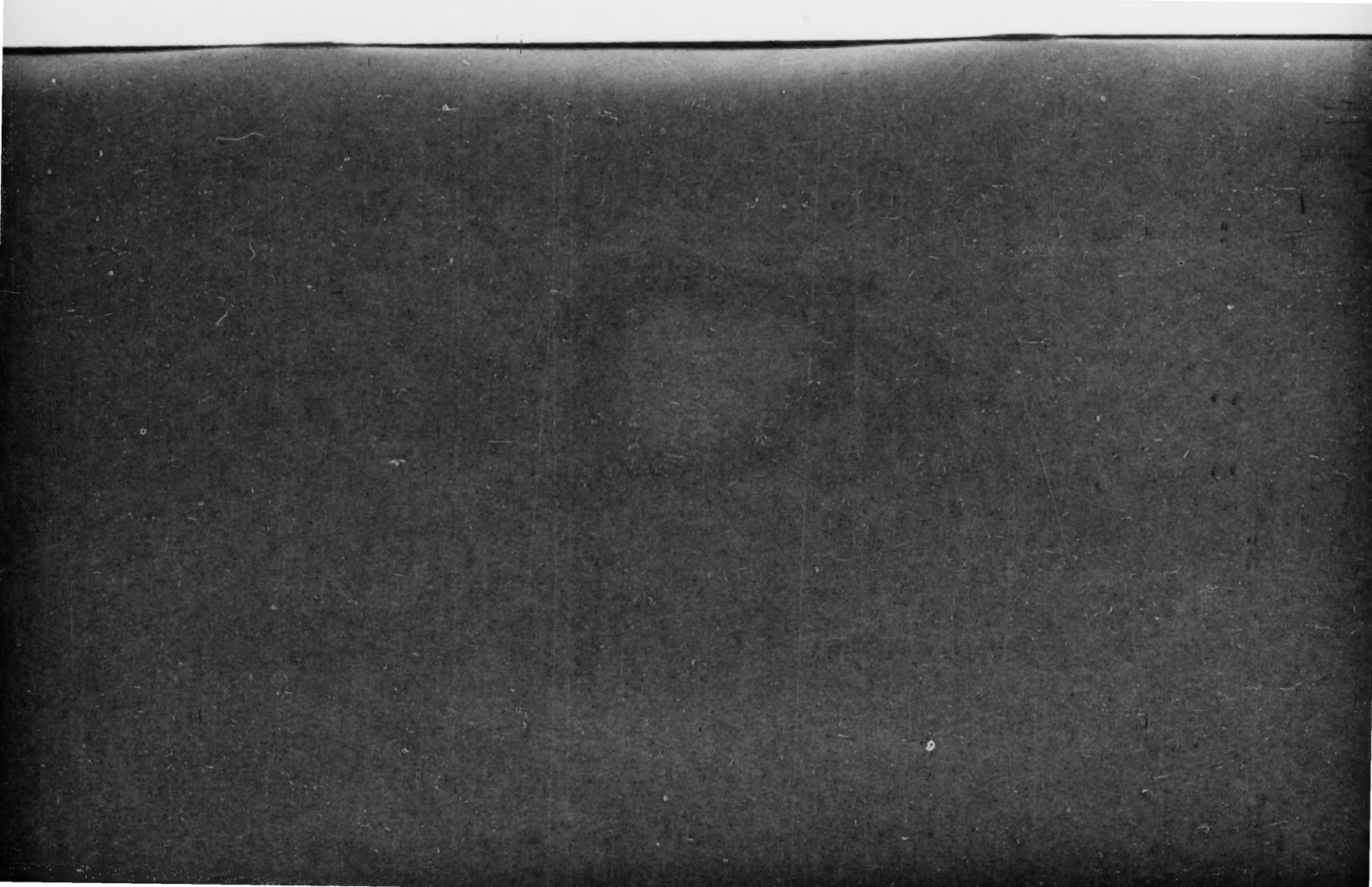

QUESTION PRESENTED

1. Whether the Seventh Circuit Court of Appeals, faced with the district court's finding that petitioner was discharged because of his age, and the district court's inconsistent finding that petitioner was discharged for legitimate nondiscriminatory reasons, properly reviewed the entire record to conclude that the district court's finding of age discrimination was unsupported by the evidence and was, therefore, clearly erroneous.

RULE 28.1 LISTING

Respondent, Gold Bond Building Products, is an operating division of National Gypsum Company. Gold Bond Building Products has no other parents, affiliates or subsidiaries. National Gypsum Company's only subsidiary is the Austin Company.

National Gypsum Company is a wholly owned subsidiary of Aancor Holdings, Inc. The majority shareholder of Aancor Holdings, Inc. is Lafarge Coppee, a French concern.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Gold Bond Building Products, a division of National Gypsum Company, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Seventh Circuit's opinion in this case.

OPINIONS BELOW

The unreported oral opinion of the United States District Court for the Northern District of Illinois was issued on February 20, 1987 (Pet. App. 1).[1] Following respondent's appeal and petitioner's cross-appeal, the United

[1] Petitioner submitted a corrected appendix to this Court on March 6, 1989, in which he retyped (with numerous

(footnote continued on next page)

States Court of Appeals for the Seventh Circuit issued its opinion reversing the district court's decision on September 27, 1988 (Pet. App. 13). On September 29, 1988, the court of appeals amended its opinion in an unreported order (Pet. App. 24). On November 2, 1988, the court issued an unreported order denying petitioner's petition for rehearing and suggestion for rehearing en banc, and again amending its opinion (Pet. App. 25). The published opinion of the Seventh Circuit, 859 F.2d 1283, reflects both of these amendments.

STATEMENT OF THE CASE

The court of appeals accurately summarized the facts of this case in its decision. 859 F.2d at 1284-85 (Pet. App. 14c-15b). To rectify several misstatements in the petition, however, respondent has briefly set forth the relevant facts, followed by a summary of the lower courts' opinions.

Facts

Respondent manufactures wallboard at a plant in Waukegan, Illinois. Petitioner became the board plant superintendent of that plant in 1979.

In the early 1980s, the Waukegan plant suffered a substantial decline in business, leading to the layoff and termination of a large number of employees. The downturn continued, however, and in February, 1982, respondent shut down the plant indefinitely. It retained a skeletal staff of four supervisors, including petitioner, to act as custodians of the equipment.

In early 1983, respondent reopened the plant on a 90-day trial basis. Upper management determined that the earlier failure of the plant to operate successfully was due,

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(footnote continued from preceding page)

typographical errors) the lower courts' opinions, portions of the trial transcript, and the text of selected exhibits. References to that appendix are abbreviated herein as "Pet. App. —."

in large part, to exceedingly poor relations between supervisors and hourly employees (Pet. App. 2a; Tr. 81-82, 203, 405-06).[2] Respondent decided that the plant would survive the 90-day trial period only if it could be reopened in an employee relations atmosphere conducive to profitability (Pet. App. 2a). To help this happen, respondent implemented new supervisory standards that emphasized more harmonious relations between supervisors and employees, which might lead to decertification of the union (Tr. 43-45, 86-88, 127-28, 202-03, 210). If this experiment did not work by the end of the 90-day period, respondent planned to permanently close the plant.

Respondent named Michael Ward, a long-time Gold Bond employee, as the new plant manager. Ward's immediate supervisor, Robert Sarvis, instructed Ward that he had only 90 days to begin operating the plant successfully. Ward was told to place great importance on improving employee relations (Tr. 43-45, 202-03).

Shortly before Ward assumed control of the Waukegan plant, he asked the former plant manager, Tom Brooks, about the strengths and weaknesses of the employees. Brooks told Ward that petitioner had difficulty getting along with the plant employees, and that he was disliked—even hated—by most of the hourly work force. Brooks also cited complaints from female employees that they had been sexually harassed by petitioner. Brooks told Ward that Becky Parkman, the personnel safety supervisor, had complained to him that petitioner had grabbed her by the crotch during a supervisors' dinner and, a few months later, referred to her and another employee as lesbians. Brooks also said that Darlene Ramig, the payroll secretary, had complained that petitioner had suggested that he would help her get promoted if she went to a nearby motel with him. Parkman independently confirmed these incidents when

[2] References to the trial transcript, which was Item Nos. 113 and 114 of the record on appeal, are abbreviated herein as "Tr. ____."

questioned by Ward, and Ramig confirmed the motel proposition and lesbian comment in her testimony at trial (Tr. 206-07, 214-17, 433-38).[3]

Upon arriving at the Waukegan plant in April, 1983, Ward reviewed the performance appraisals of the four remaining employees. Each of petitioner's last three appraisals, covering 1980 through 1982, ranked him low in the newly critical area of employee relations.

Jon Roth, who had been the union president at the plant for 20 years, also spoke with Ward about petitioner. Roth told Ward that the rank-and-file employees "hated" petitioner, that he was the root cause of most labor-management problems at the plant, and that the union had repeatedly complained to management about him (Tr. 217-20, 405, 413, 415). Roth also told Ward that petitioner had outraged black employees by referring to them as "niggers" and "boys" (Tr. 219, 408-11, 415).

Given the strict time constraints Ward was working under, his imperative to create a harmonious employee relations environment, the overwhelming amount of negative information that he had received about petitioner, and his own observations, Ward concluded that petitioner lacked the qualifications needed for the plant's 90-day trial period to succeed (Tr. 154-55, 220-21). Ward informed petitioner, therefore, that he was being discharged for his "people problems," and because he could not fit in with respondent's new emphasis on employee relations. After Ward (then age 48) discharged petitioner (age 51), he continued the start-up of the plant by hiring three new supervisors: Roth (age 43), Junior Henkel (age 53), and Herman Fraley (age 36). Ward selected Roth as a supervisor because Ward believed that

[3]The district court overruled petitioner's hearsay objection to Ward's testimony about what he had been told by Brooks, since that testimony was offered and admitted not to prove the truth of what Ward had been told, but rather, to show Ward's state of mind at the time he fired petitioner (Tr. 204-05). *See* Fed. R. Evid. 801(c).

Roth would help respondent achieve the type of employee relations atmosphere that would lead to decertification of the union (Pet. App. 3, 6).

The District Court's Opinion

At the conclusion of the trial, the district court issued its opinion orally from the bench, ruling that respondent had committed a nonwillful violation of Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA").

The district court found that respondent made a "conscious management decision" to reopen the plant on a 90-day trial basis to see if it could be operated "under conditions conducive to long-term profitability" (Pet. App. 2a). One key "aspect of that strategy," according to the court, "was that management would stroke the work force, a little more than had previously been the practice . . ." (Pet. App. 3a). In the words of the district court: "Michael Ward certainly knew . . . that they had 90 days, basically, to turn it around. . . . [H]e wanted supervisors that wouldn't upset the hourly employees unduly" (Pet. App. 6). In other words, "[m]anagement did want a little softer supervision" (Pet. App. 11).

The district court found that petitioner did not meet these new standards. The trial judge found that petitioner was a "head knocker" who was "quite clearly strict, not terribly flexible," and "a tough boss," that Ward was "certainly aware that stroking [the work force] wasn't one of [petitioner's] strong points," and that petitioner was disliked by the employees (Pet. App. 4a, 6, 10). The district court found, therefore, that petitioner "was one kind of supervisor . . . which was *not* totally what [respondent] had in mind during the immediate future" at the plant, and that this "was a factor" in Ward's decision to discharge him (Pet. App. 6-6a; emphasis added).

The trial judge explicitly discredited petitioner's only direct evidence of age discrimination, which consisted of

testimony by Sarvis that his supervisor, Robert Spitz, had instructed Ward to discharge petitioner because he was "too old and too fat for the job." The court found that Sarvis was not "a particularly credible witness," that it was "unlikely" that Spitz was involved in the discharge decision, and that the conference call in which Spitz supposedly said that petitioner was "too old" never even occurred (Pet. App. 5, 6a).

Despite all this, the district court found that "age was a factor" in petitioner's termination (Pet. App. 6a). The court cited "a feeling that [petitioner] was expendable" and noted that respondent "didn't try to teach an old dog new tricks" (Pet. App. 6a-7). The fact that management wanted "softer supervision," according to the court, "was a factor related to the plaintiff's age in the sense that they were, in effect, saying: And we're not going to take a chance with him" (Pet. App. 11). The court described the reports Ward received regarding petitioner's "head-knocking" performance as a "laundry list of irrelevancies" that were equivalent to a "pretext list" (Pet. App. 7, 11).

The Court of Appeals' Opinion

The Seventh Circuit reversed the district court's ruling that respondent had violated the ADEA. The court of appeals held that the district court's finding of age discrimination was clearly erroneous "[b]ecause there was insufficient evidence to support a finding that age was a determinative factor in Grohs' dismissal." 859 F.2d at 1284 (Pet. App. 14b). The court of appeals focused on two contradictory findings by the district court: (1) that petitioner was discharged because Ward concluded that he was not qualified to remain a supervisor under respondent's new management style; and (2) that petitioner was discharged because of his age. After reviewing the entire record, the Seventh Circuit panel unanimously agreed that although there was considerable evidence in support of the first of these findings, there was no evidence in support of the second. The court held, therefore, that the district court

clearly erred in finding that respondent acted with discriminatory intent in discharging petitioner.

SUMMARY OF ARGUMENT

In deciding this ordinary, run-of-the-mill ADEA case, the Seventh Circuit applied well-established legal principles that in no way conflict with any decisions of this Court or the other circuit courts. After a careful examination of the entire record, the court of appeals, employing the proper standard of review, held that the district court's finding of discriminatory intent was clearly erroneous, because it was plainly unsupported by the evidence. The Seventh Circuit's application of substantive law, moreover, creates no conflict with the decisions of other appellate courts.

This wholly unexceptional case, therefore, presents no novel issues of law, no matters of national significance, and nothing of particular concern to anyone other than petitioner and respondent. Because there are no "special and important reasons" for granting review, Sup. Ct. R. 17.1, the petition for a writ of certiorari should be denied.

ARGUMENT

I.

THE SEVENTH CIRCUIT PROPERLY APPLIED THE CLEARLY ERRONEOUS STANDARD OF REVIEW.

Petitioner's principal contention is that the court of appeals violated Rule 52(a) of the Federal Rules of Civil Procedure by failing to apply the clearly erroneous standard to the district court's finding that petitioner was discharged because of his age.[4] In fact, however, the Seventh Circuit cited and applied that standard in full accordance with prior decisions by this Court and the other federal appellate courts. Thus, there is no reason for this Court to review the Seventh Circuit's decision.

[4] At least five of the eight "questions presented" in the petition are devoted to this claim, as is virtually all of petitioner's argument. Petition at pp. i-ii, 28-46, 51-65.

Applying *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), the court of appeals correctly held that the district court's finding of age discrimination could not be reversed unless it was clearly erroneous. 859 F.2d at 1286 (Pet. App. 16c). As this Court has held:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). This test "expressly contemplate[s] a review of the entire record" by the court of appeals. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). Where such a review reveals that a trial judge's finding of fact is not supported by substantial evidence, that finding is clearly erroneous. *See, e.g., Lame v. United States Dep't of Justice*, 767 F.2d 66, 69-70 (3d Cir. 1985); *Duty v. United States Dep't of Interior*, 735 F.2d 1012, 1015 (6th Cir. 1984); *Lincoln v. Board of Regents of University System of Georgia*, 697 F.2d 928, 939 (11th Cir.), *cert. denied*, 464 U.S. 826 (1983); *Cannizo v. Farrell Lines, Inc.*, 579 F.2d 682, 686 (2d Cir. 1978); *Case v. Morrisette*, 475 F.2d 1300, 1307-08 (D.C. Cir. 1973); *Rewis v. United States*, 445 F.2d 1303, 1304 (5th Cir. 1971); *S.S. Silverblatt, Inc. v. Seaboard Security Co.*, 417 F.2d 1043, 1055 (8th Cir. 1969); 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2585, at 735 (1971). The appellate courts regularly apply this test to reverse findings of discrimination. *See, e.g., Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 165 (3d Cir. 1985); *Miller v. Mercy Hospital, Inc.*, 720 F.2d 356 (4th Cir. 1983), *cert. denied*, 470 U.S. 1083 (1985); *Danzl v. North St. Paul-Maplewood-Oakdale Independent School District No. 622*, 706 F.2d 813 (8th Cir. 1983).

The Seventh Circuit properly applied these well-established rules in reversing the lower court's decision. The trial judge found that respondent decided that in order to survive the 90-day trial period, it needed supervisors who, in

management's view, could work with the hourly employees in a cooperative, nonadversarial manner. The district court also found that respondent was "certainly aware" that petitioner lacked these qualifications, and that his lack of qualifications under respondent's new standards caused respondent to discharge him.

In stark contrast, however, the district court also found that petitioner's termination was the result of age discrimination, rather than being based on legitimate business reasons. Without any supporting evidence, the lower court found that respondent viewed petitioner as "expendable" and an "old dog" who respondent "didn't try to teach . . . new tricks." Although there was no evidence that any younger employees with similar problems received preferential treatment, the court said that it "could not help but conclude" that if petitioner had been younger, respondent would have trained him how to meet the new supervisory standards. And although the court clearly credited Ward's testimony that he genuinely based his decision to discharge petitioner on the negative reports he received about petitioner's performance as a supervisor at the plant, it dismissed the events that were the subject of these reports as a "laundry list" or "pretext list" of "irrelevancies."

Faced with these diametrically opposed findings, the Seventh Circuit reviewed the entire record to determine whether they could be reconciled and, if not, to decide which finding was supported by the evidence. As this Court has held, in deciding whether a finding is clearly erroneous, a court of appeals must determine whether "the district court's account of the evidence is plausible in light of the record viewed in its entirety" and whether the district court's findings are "internally inconsistent." *Anderson*, 470 U.S. at 573-75. Applying these basic principles, the Seventh Circuit properly held that its responsibility was "to 'determine whether the trial judge's interpretation of facts is implausible, illogical, internally inconsistent or contradicted by documentary or other extrinsic evidence.' " 859 F.2d at

1289 (Pet. App. 19), quoting *Ratliff v. Milwaukee*, 795 F.2d 612, 617 (7th Cir. 1986) (citing *Anderson*). Thus, the court of appeals reviewed the entire record to see if the district court's finding of discrimination was supported by the evidence.

Petitioner contends that by conducting this review, the Seventh Circuit usurped the district court's role as a fact-finder. In reality, however, the court of appeals undertook the only logical method of determining whether the lower court's finding of age discrimination was clearly erroneous. This Court's decisions in *United States Gypsum, Bose* and *Anderson*, as well as countless circuit court decisions, make clear that where, as here, an appellant argues that a finding of fact is clearly erroneous, the court of appeals may review the entire record to determine whether that finding is supported by the evidence. Such a review is not *de novo* fact-finding; rather, it is the prescribed method for deciding whether a finding may stand on appeal. Under the circumstances, therefore, the Seventh Circuit's review of the evidence was not only perfectly proper, it was required.

Nor did the Seventh Circuit err in how it carried out that review. The court found clear evidentiary support for the district court's finding that petitioner was discharged because Ward believed that petitioner did not meet respondent's new requirements for "softer" supervision. The district court credited Ward's testimony that he fired petitioner because he believed that petitioner's personality did not fit in with respondent's new strategy of "stroking" the work force. There was no dispute that before Ward decided to discharge petitioner, he received a series of independent reports about petitioner's deficiencies in the newly critical area of labor relations. Petitioner never challenged the fact that Ward read and heard these reports, or that he relied upon them in deciding to discharge petitioner. There was no evidence, moreover, that Ward's belief in petitioner's weaknesses was not genuinely held in good faith. To the contrary, the district court specifically found

that Ward was "*certainly aware* that stroking [the work force] wasn't one of plaintiff's strong points" and that petitioner's management style "was not totally what [respondent] *had in mind* during the immediate future at Waukegan" (Pet. App. 6; emphasis added). The district court's finding that petitioner was discharged for legitimate reasons, therefore, was amply supported by the evidence.

The Seventh Circuit next reviewed the record to see if there was evidentiary support for the district court's contradictory finding of age discrimination. As the court of appeals noted, however, the record contains "sparse" evidence of discriminatory intent, "insufficient proof of disparate treatment," and "little or no direct or indirect evidence that Grohs' discharge was brought about by any concerns other than his ability to supervise employees in a 'softer' manner." 859 F.2d at 1288-89 (Pet. App. 18b, 19).[5] The court's review of the record revealed no direct evidence of age discrimination, since the district court had explicitly rejected petitioner's only such evidence as incredible. 859 F.2d at 1287 (Pet. App. 17-17a). The Seventh Circuit likewise discovered no indirect evidence to support the district court's finding that petitioner was discharged because of his age. Petitioner, attempting on appeal to create a *post hoc* justification for that finding, made three arguments that such indirect evidence existed: (1) the instances of petitioner's behavior which were reported to Ward immediately before he discharged Grohs were too far removed in time to have motivated the discharge; (2) respondent treated younger, similarly situated employees better than petitioner; and (3) petitioner's overall past performance had once been acceptable to respondent.

The court of appeals rejected the first two of these arguments as simply unsupported by the evidence. As for

[5] Given the absence of such evidence, the court of appeals observed that "it is not surprising that the district judge's oral findings of fact simply do not reflect evidence of age discrimination." 859 F.2d at 1288 (Pet. App. 18b).

respondent's supposed reliance on ancient events, the evidence showed that because the Waukegan plant had been shut down since early 1982, the most recent information about petitioner's supervisory performance at the plant dated from 1980 and 1981. Given that respondent had established new supervisory standards in 1983, focusing on how well a supervisor could relate to hourly employees, it was necessary for respondent to reevaluate the performance of its supervisors in light of these new standards. Because petitioner had last supervised hourly employees at the plant in 1980 and 1981, the Seventh Circuit properly held that it was not pretextual for respondent to review petitioner's performance from those years to decide what to do with him in 1983. 859 F.2d at 1287 (Pet. App. 17a-17b).

The court of appeals likewise dismissed petitioner's second argument, that he was discharged while similarly situated younger supervisors were retained, as devoid of evidentiary support. Indeed, the district court found no evidence of disparate treatment in concluding that discrimination had occurred, and no such evidence exists. Petitioner nevertheless contended that respondent's decision to hire the 43-year-old Roth after discharging the 51-year-old petitioner constituted disparate treatment based on age. The district court, however, explicitly distinguished Roth from petitioner, finding that respondent hired Roth because it determined that he—unlike petitioner—would be useful in decertifying the union.[6] As the court of appeals correctly noted, therefore, hiring Roth was "consistent with Gold Bond's new 90-day strategy, rather than constituting evidence of age discrimination." 859 F.2d at 1288 (Pet. App. 18c). In short, as the Seventh Circuit held, the record contained no evidence of disparate treatment based on age.

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[6]The district court found that respondent hired Roth because it would have "his leadership skills enlisted on behalf of Gold Bond," and that Ward was "aware that he wanted and needed Roth" to make respondent's new approach toward employees work (Pet. App. 3, 6).

Finally, the court of appeals rejected petitioner's attempt to base the district court's finding of discrimination on the claim that, until 1983, respondent had "accepted" petitioner's deficiencies in labor relations. The Seventh Circuit held that to the extent the district court relied on this factor to find discrimination, its finding was based upon an incorrect view of applicable law, and was, therefore, clearly erroneous. 859 F.2d at 1288 (Pet. App. 18c). *See, e.g., United States v. Singer Mfg. Co.,* 374 U.S. 174, 194 n.9 (1963); *Ritter v. Morton,* 513 F.2d 942, 949 (9th Cir. 1975); *Case v. Morrisette, supra,* 475 F.2d at 1307-08 (findings of fact clearly erroneous where induced by erroneous view of the law). In particular, the Seventh Circuit held that where, as here, an employer establishes new, more demanding qualifications, the fact that an employee's past performance had once been acceptable under less rigorous standards, does not, under well-established law, show pretext. 859 F.2d at 1287-88 (Pet. App. 17a-18b).

In sum, as the Seventh Circuit held, a thorough review of the record reveals no evidence to support the district court's finding of age discrimination. That lack of evidence made it impossible for the court of appeals to reconcile the district court's finding that petitioner was terminated for legitimate reasons and its concurrent finding that he was terminated for discriminatory reasons. Since the latter finding, unlike the former, was not supported by the evidence, and was based on an erroneous understanding of applicable law, the Seventh Circuit properly reversed the finding of discrimination as clearly erroneous.

Contrary to petitioner's arguments, therefore, the Seventh Circuit applied the appropriate standard and method of review to the district court's findings—a standard and method long endorsed by this and every other federal appellate court. Accordingly, there is no reason for this Court to review this case.

II.

THE SEVENTH CIRCUIT'S APPLICATION OF SUBSTANTIVE LAW CREATES NO RELEVANT CONFLICT WITH DECISIONS BY OTHER CIRCUITS OR THIS COURT.

Petitioner implicitly asserts that this Court should grant review to resolve a purported "conflict" between the Seventh Circuit's decision in this case and the Fifth Circuit's decision in *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988), concerning a plaintiff's burden of proof in establishing a prima facie case of discrimination. Petition at pp. ii (question 5), 47-51.

Even assuming, *arguendo*, that any such conflict over the elements of a prima facie case did exist, it would be irrelevant to this case. Once the trial of a discrimination case has ended, the question of whether the plaintiff established a prima facie case no longer matters. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).[7] Specifically applying that rule, the Seventh Circuit did *not* base its decision on whether or not petitioner had established a prima facie case; rather, consistent with *Aikens*, it properly focused on the ultimate issue of "whether there was sufficient evidence to support a finding that age was a determinative factor in defendant's dismissal of the plaintiff." 859 F.2d at 1286 (Pet. App. 16a). Any so-called "conflict" among the circuits on how a plaintiff proves a prima facie case, therefore, is irrelevant to this fully tried case, and provides no basis for petitioner to obtain review.

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[7] The prima facie issue arose in *Bienkowski* only because the district court had dismissed the case on summary judgment prior to trial.

CONCLUSION

Based on the preceding facts, arguments and authorities, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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